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Chapter 15: Zoning and Land Use

Richard G. Huber

CHAPTER 15

Zoning and Land Use

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§15.1. Racially Discriminatory Intent: Claimed Violation of 14th Amendment and Fair Housing Act of 1968. During the 1977 *Survey* year, the Supreme Court applied its recent decision in *Washington v. Davis*[1] to the area of zoning regulation. In *Davis,* plaintiffs challenged the constitutionality of police force entrance examinations, basing their attack on the disproportionate rate of failure among black examination takers. The Court held that in the absence of discriminatory intent, state action is not unconstitutional solely because it results in a racially disproportionate impact.[2] The Court applied the *Davis* principle to zoning in its decision of *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[3]

Arlington Heights is a suburb located approximately 26 miles from Chicago. During the 1960's the town experienced rapid population growth. The 1970 census reported a population of approximately 64,000 people, of whom only twenty-seven were black.[4] Zoning had been adopted by ordinance in 1959, with the vast majority of land in Arlington Heights zoned for detached single-family residences. The land in question was a vacant fifteen acre portion of a tract of eighty acres owned by the Clerics of Saint Viator, a Roman Catholic order. The entire eighty acres was zoned R-3 (Arlington Heights' code provision for single-family zoning) and was bordered by single-family houses.

In 1970 the Order decided to utilize the fifteen acre tract for low and moderate income housing. It sought a non-profit developer familiar with federal housing subsidy procedures.[5] Respondent Metropolitan Housing Development Corporation (MHDC) was chosen to develop the site and

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§ 15.1. [1] 426 U.S. 229 (1976).

[2] *Id.* at 242.

[3] 429 U.S. 252 (1977).

[4] *Id.* at 255.

[5] *See* 12 U.S.C. § 1715z-1 (1976).

was given a lease with an option to purchase the tract. MHDC then petitioned for rezoning of the tract to R-5 (the village's zoning classification for multiple-family cluster housing). After three public meetings on the proposed rezoning, the village rejected the MHDC petition. The reasons cited by the village were essentially the same as those presented during the ensuing legal struggle: (1) the property owners who bordered the fifteen acre tract bought in reliance on the immutability of R-3 (single-family) zoning; (2) if the tract was rezoned to R-5 there would be a drop in the value of the surrounding property; and (3) R-5 zoning in the village was designed to serve as a "buffer" between R-3 zoning and commercial/manufacturing zones which were not present in the vicinity of the proposed development.[6]

MHDC and three individual plaintiffs sued the village in federal court.[7] In 1974, the federal district court held that the refusal to rezone the tract (1) was not motivated by racial discrimination; (2) was a reasonable plan to protect property values; and (3) was a reasonable way to maintain the prevailing zoning plan in light of the preceding.[8]

The Court of Appeals reversed and held that while the findings of the district court were valid, the "ultimate effect" of the zoning plan was racially discriminatory.[9] The court ruled that the motivation of the village in refusing to rezone was immaterial, and that the strict scrutiny test was to be applied if a discriminatory effect flowed from the refusal to rezone the land.[10] The fact that a greater percentage of blacks than whites were adversely affected by the action did not in itself call for the test.[11] However, the court of appeals interpreted *Kennedy Park Homes v. City of Lackawanna*[12] as requiring rezoning if the "historical context and ultimate effect" so warrant.[13] Focusing on the ultimate effect, plus the fact that Arlington Heights had no alternate plans for providing low and moderate income housing, the court of appeals felt compelled to employ strict scrutiny. Neither the "protection of property value" argument nor the reasonableness of the "buffer" use of R-5 zoning could qualify as a compelling state interest under the test. The court therefore reversed the decision of the district court.[14]

The Supreme Court reversed, holding that the discriminatory effect

[6] 429 U.S. at 258.

[7] 373 F. Supp. 208 (N.D. Ill. 1974).

[8] *Id.* at 211.

[9] 517 F.2d 409 (7th Cir. 1975).

[10] *Id.* at 413. Eligibility for the proposed housing was based on income. Although blacks constituted only eighteen per cent of the Metropolitan Chicago population, they comprised forty per cent of the population which would be eligible for the housing.

[11] *Id.*

[12] 436 F.2d 108, 112 (2d Cir. 1970).

[13] 517 F.2d at 413.

[14] *Id.* at 415.

of the lack of low and moderate income housing was insufficient to invoke a remedy under the equal protection clause.[15] Relying on *Washington v. Davis,* the Court required proof of a racially discriminatory purpose behind the refusal to rezone.[16] *Davis* did not mandate that a racially discriminatory purpose be the dominant or primary concern of the regulation under attack, but such purpose must be shown to have been a motivating factor.[17] Once this is shown, the usual "judicial deference" to the legislature's balancing of interests is no longer justified, and strict scrutiny is invoked.

The Court distinguished between the case in Arlington Heights, which did not contain evidence of discriminatory purpose, and a case which might involve an unlawful discriminatory motivation. The Court hypothesized: "[I]f the property involved here always had been zoned R-5 but suddenly was changed to R-3 when the town learned of MHDC's plans to erect integrated housing, we would have a far different case."[18]

The village's decision not to rezone was sustained because it had adopted its zoning policies well in advance of MHDC's challenge and because it had consistently applied its zoning policies in the past.[19] The Court thus held that respondents did not carry their burden of proving racially discriminatory purpose in the village's failure to rezone.[20]

The Court noted, however, that the statutory issue of whether the village's actions violated the Fair Housing Act[21] was never decided by the lower courts.[22] The case was remanded to the court of appeals for resolution of this issue.[23]

Upon remand, the Seventh Circuit held that the standard of review used in Title VII of the Civil Rights Act of 1964[24] was to be applied to the Fair Housing Act. Under this standard, discriminatory effect is the primary factor to be weighed, rather than a racially discriminatory pur-

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[15] 429 U.S. at 270-71.

[16] *Id.* at 264-65.

[17] *Id.* at 265-66.

[18] *Id.* at 267.

[19] *Id.* at 270.

[20] *Id.*

[21] 42 U.S.C. §§ 3601-3631 (1976). The Fair Housing Act, Title VIII of the Civil Rights Act of 1968, was designed to eliminate racial discrimination in the rental or sale of housing (dwelling). A "dwelling" includes vacant land which is for sale or rent. This latter provision creates a means of challenging "exclusionary zoning" practices, such as those which were alleged to exist in Arlington Heights.

[22] 429 U.S. at 271.

[23] *Id.*

[24] 42 U.S.C. §§ 2000e-2000e-17 (1976). Title VII, an effort to achieve equality of employment opportunity, has been interpreted by the Supreme Court as invalidating employment practices which create a racially discriminatory effect without the requirement of a showing of discriminatory intent. *See* Washington v. Davis, 426 U.S. 229, 238-39, 246-48 (1976).

pose.[25] The court of appeals held that the village's refusal to rezone would violate the Act if no other land properly zoned and suitable for such housing was available in Arlington Heights.[26] The court then remanded the case to the district court for a determination of this issue.

As of the date of this writing, the final resolution of the Arlington Heights' controversy has not been determined. It appears, however, that the exclusionary zoning issue has prompted two standards of review: The constitutional standard as expressed in the Supreme Court's decisions in *Washington v. Davis* and *Arlington Heights,* where discriminatory intent must be shown, and the statutory standard of *Trafficante v. Metropolitan Life Insurance Co.*[27] and the Seventh Circuit on remand in *Arlington Heights,* where a discriminatory effect is all that need be shown. While the constitutional standard appears settled, the application of statutory standard is not certain. The Seventh Circuit held on remand that the Fair Housing Act required the village to allocate some land for low and moderate income housing, but it appears that the village could still refuse to rezone the particular fifteen acre tract in question so long as an alternate site was available.[28]

The Supreme Court's decision in *Arlington Heights* reserves judicial equal protection remedies for those zoning cases where an undefined measure of "racially discriminatory purpose" can be proven. This standard does little to prevent a town which has had zoning ordinances on its books for years and which has applied them with a measure of consistency from continuing to keep racial minorities out of their territorial limits. This is true because discriminatory effect, even if obvious, is insufficient to invoke strict scrutiny. Only if a town is found to have engaged in conduct motivated by a racially discriminatory purpose will it be required to come forward with a compelling interest with which it may justify the disproportionate racial impact of its action. Similarly, under the Seventh Circuit's resolution of the Fair Housing Act issue, it appears that a town may lawfully refuse to rezone a particular parcel if there is available for development other land which is zoned for the kind of housing which meets the needs of low and moderate income persons. Thus if some other land is "available," a term not well-defined, a developer cannot rely on the equal protection clause or the Fair Housing Act to force a town to rezone his particular parcel.

§15.2. Zoning: Special Permits: Conditions Imposed for Furtherence of Social Goals. A special permit granting authority may only grant such permits as are expressly authorized by a zoning ordinance. Its commission is not a roving one to remedy all evils which might be

[25] 558 F.2d 1283, 1289 (7th Cir. 1977).
[26] *Id.* at 1294.
[27] 409 U.S. 205 (1972).
[28] 558 F.2d at 1295.

corrected through the zoning power; it is subject to definite limitations.[1] These limitations apply even when a legislative body, such as a board of selectment, holds permit granting authority. This is because the body acts in such an instance in an administrative, rather than legislative, capacity. Generally a permit granting authority is empowered to attach conditions to a grant of a special permit.[2] A condition is properly imposed when it does not offend the provisions of an ordinance or by-law but is reasonably calculated to protect adjacent land and achieve a legitimate objective of the zoning ordinance or by-law.[3]

Furthermore, it is not the function of land use controls to remedy evils outside the scope of zoning ordinances, even when such problems are closely related to land use. Thus, a condition in a special permit regulating an applicant's business is invalid if not within the proper scope of land use control.[4] During the 1977 *Survey* year the Supreme Judicial Court considered the question of whether the laudable objective of increasing the availability of low-income and elderly housing may be achieved through the special permit device.

In *Middlesex & Boston Street Railway Company v. Board of Aldermen of Newton*,[5] the defendant Board of Aldermen, acting in its capacity as the special permit authority under a Newton ordinance, granted a special permit to the plaintiff to erect a fifty-four unit garden apartment development. Two conditions attached to the permit, however, were challenged by the plaintiff; one required the removal of all solid waste from the site at the owner's expense, and the other required the plaintiff to lease to the Newton Housing Authority (NHA) five units for use in its federally subsidized housing program at rates far lower than plaintiff intended to charge.[6] In an appeal to the superior court under former G.L. c. 40A, section 21,[7] plaintiff alleged that the conditions imposed by the Board were in excess of its authority and asked that both conditions be annulled. After a hearing, the superior court made detailed findings of fact, concluded that both conditions were

§ 15.2. [1] ANDERSON, AMERICAN LAW OF ZONING (2d Edition 1976) § 19.09.

[2] For a case stating that former G.L. c. 40A, § 4 contemplates conditions attached to a special permit, *see* Dowd v. Board of Appeals of Dover, 1977 Mass. App. Ct. Adv. Sh. 231, 360 N.E.2d 640. The relevant section under the new Act is G.L. c. 40A, § 9.

[3] ANDERSON, supra n.1 at § 19.30. Just as the imposition of conditions is limited, there are ordinances under which it is mandatory. Hence, in the latter case, the issuance of a permit without conditions is invalid. *Id.* at § 19.29.

[4] *Id.* at § 19.31; *see also* Annotation, 99 A.L.R.2d 227 (1965).

[5] 1977 Mass. Adv. Sh. 231, 359 N.E.2d 1279.

[6] *Id.* at 232, n.3, 359 N.E.2d at 1280, n.3. The leasing condition required plaintiff to lease to the NHA one-bedroom units for $180 per month and two-bedroom units for $202 per month. Plaintiff rented apartments in the same development for $425 per month for a one bedroom unit and $475 per month for a two bedroom unit.

[7] The appeal was brought under the former chapter 40A, The Zoning Enabling Act; the applicable section under the new Act is G.L. c. 40A, § 17.

valid, and dismissed the appeal. This decision was in turn appealed to the Supreme Judicial Court, which affirmed in part and reversed in part.

With regard to the waste removal condition, the plaintiff argued that since no other owners of a completed apartment building in Newton had been required to dispose of solid waste from the building site at their own expense, to require it to do so was invidiously discriminatory, arbitrary, capricious, a denial of equal protection of the laws, and a taking of property without compensation.[8] The Court noted that these claims were impressive in the abstract, but it found the record lacking in facts adequate to support them. Thus the Court held that the plaintiff had failed to sustain its burden of proof in seeking to overturn this aspect of the Board's action.[9]

The Court was more sympathetic to the plaintiff's objection to the condition that required it to lease units to the City for use as subsidized housing. The Court held that the Board did not possess the power to impose this condition to the special permit even though the General Laws allow special permit granting boards to issue permits subject to appropriate safeguards and conditions.[10] The Court distinguished between a valid grant of a special permit to an applicant and the imposition on an applicant of a special condition as part of the special permit. The Court could find no language in the statute or the Newton zoning ordinance expressly authorizing the imposition of this condition.[11] The Court then explored other possible sources of authority which might validate the Board's action.

The Court could find no authority in the Home Rule Amendment,[12]

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[8] 1977 Mass. Adv. Sh. at 233-34, 359 N.E.2d at 1281.

[9] *Id.* at 234, 359 N.E.2d at 1281. The superior court had stated:

> Condition seven [the rubbish removal condition] is clearly related to the purposes of zoning, namely "to facilitate the adequate provision of public requirements" (c. 40A, § 3) and is therefore a valid condition. Plaintiffs allege that the imposition of this condition on them alone amounts to a denial of equal protection. Evidence at trial indicated that the board is not singling out plaintiffs and imposing this condition on them alone. Rather, the board is instituting a new policy and plaintiffs are among the first to come within the new policy. Since the action of the board is not irrational or arbitrary in this case and is validly related to a legitimate purpose, it would not be found to violate the equal protection clause. [*Citing* Railway Express Agency, Inc. v. New York, 336 U.S. 106, 110 (1949).] *Id.* at 234, 359 N.E.2d at 1281.

Therefore, there was not an arbitrary act, but a new policy. The Court could not find evidence to support a conclusion that the imposed condition violated the plaintiff's constitutional rights or that the imposition of this condition to a special permit exceeded the Board's power, 1977 Mass. Adv. Sh. at 234-35, 359 N.E.2d at 1281.

[10] 1977 Mass. Adv. Sh. at 236, 359 N.E.2d at 1282. Former G.L. c. 40A, § 4. The parallel provision under the new Act is G.L. c. 40A, § 9.

[11] *Id.* at 239, 359 N.E.2d at 1283.

[12] MASS. CONST. AMEND. art. II. Section 8 of the amendment reserves to the General

by which the City attempted to support its low-income and elderly housing permit condition. The Court stated that the General Court, through section 8 of the Home Rule Amendment, had occupied the zoning field for all cities and towns; this pre-emption negated any implied power in the municipality.[13] The Court held alternatively that the type of municipal function that the amendment applies to is legislative, and thus could not be exercised by the Board of Aldermen when sitting as a permit granting authority.[14]

The Court rejected the Board's principal claim that its condition was justified by the general public welfare language contained in the Zoning Enabling Act.[15] The Board also stressed the general welfare language in conjunction with some of the specific powers and duties the Act conferred upon municipalities, such as lessening congestion, conserving health, preventing overcrowded development, encouraging the most appropriate use of land, and increasing amenities.[16] Since Massachusetts case law interprets G.L. c. 40A as an affirmative measure to alleviate housing shortages for low-income and elderly persons,[17] the Board argued, there was no constitutional obstacle to the imposition of the condition and, therefore, it was valid.

The Court did not question the municipality's power to expend public funds for low-income and elderly housing. The Court held, however, that the administrative board authorized to pass on applications for special permits under the zoning ordinance was without power to make the policy decision committing the municipality to a program of low-income and elderly housing, and could not exact or compel a contribution to the cost of such a program from the plaintiff as a special permit applicant.[18]

Court "the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns." Section 6 provides that "[a]ny city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has the power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section eight . . . ."

[13] 1977 Mass. Adv. Sh. at 240, 359 N.E.2d at 1283.

[14] *Id.*

[15] Former G.L. c. 40A, § 2 (as amended by Acts of 1959, c. 607) authorized cities and towns to adopt zoning regulations "[f]or the purpose of promoting the health, safety, convenience, morals or welfare of [their] inhabitants." *See also* G.L. c. 40A, § 3 (as amended by Acts of 1975, c. 808, § 3).

[16] Former G.L. c. 40A, § 3.

[17] The statutory scheme confirming the affirmative power of zoning to meet such housing shortages includes G.L. cc. 40A, 40B, and 121B.

[18] 1977 Mass. Adv. Sh. at 241-42, 359 N.E.2d at 1284. The Court based its decision on its reading and application of the Zoning Enabling Act, G.L. c. 40A, and the Newton Zoning ordinance. *Id.* at 242, 359 N.E.2d at 1284. It did not reach the question of whether the low-income and elderly housing conditions would be constitutionally permissible if authorized by the General Court in the Zoning Enabling Act, *supra*, or by operation of

The Court determined that the plaintiff was not barred from obtaining relief because of waiver or estoppel since he had completed the construction of fifty-four dwelling units and pursued his appeal concurrently. At all times he had asserted his intention to do so. Additionally, the Board did not set up these defenses affirmatively in any of their answers as required by Mass. R. Civ. P. 8(c). Equally important in the Court's view was the fact that the Board had implicitly acknowledged and sanctioned the plaintiff's action by including a termination clause in two leases of units to the Newton Housing Authority that would operate in the event the low-income and elderly housing condition were invalidated by the courts.[19]

The plaintiff, however, was not allowed damages against either the Board or individual board members in the amount of lost rents and profits on the low-income units.[20]

Thus, the Court forbade the use of a condition to a special permit in a fashion not specifically authorized by the zoning statute and ordinance in question. The case makes clear that the decision to pursue general goals such as subsidized housing, while closely related to land-use control, lies within the purview of legislative bodies, and not permit-granting administrative agencies.

§15.3. Special Permits: Not-For-Profit Clubs in Residential Areas: Spot Zoning. The growth in recent years of widespread interest in various recreational pursuits requiring special facilities[1] has opened a market for the construction of these facilities in locations readily accessible to users. During the 1977 *Survey* year, the Supreme Judicial Court decided the issue of the appropriateness of privately-owned tennis facilities in a residential zone.

In *Kiss v. Board of Appeals of Longmeadow*[2] two separate clubs which were not operated for profit obtained special permits in August, 1974 for the use of land located in a residential zone for the construction of 8-

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the Home Rule Amendment. MASS CONST. AMEND. arts. II, LXXXIX. *Id.* Nor did it reach an argument by the board in favor of non-Euclidean zoning. *Id. See* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[19] *Id.* at 244, 359 N.E.2d at 1285.

[20] *Id.* at 245, 359 N.E.2d at 1285-86. There was no finding that members of the board had acted in bad faith; therefore they were immune to liability to the plaintiff for their erroneous imposition of the condition. *See* Gildea v. Ellershaw, 363 Mass. 800, 820, 298 N.E.2d 847, 858-59 (1973). There was no basis for imposing liability on the members of the board or the city. *See* Sherman v. Rent Control Board of Brookline, 367 Mass. 1, 6-7, 323 N.E.2d 730, 733 (1975).

§ 15.3. [1] Such recreational pursuits include tennis, racquetball, squash, and swimming.

[2] 1976 Mass. Adv. Sh. 2355, 355 N.E.2d 461.

court indoor tennis facilities.[3] Plaintiff Kiss entered separate complaints in the superior court appealing the grant of each of the permits. Plaintiffs Graziana and Diamond filed a single complaint in the same court challenging only the grant that had been extended to Shine. All three cases were transferred to the Housing Court of Hampden County.[4] The cases were tried before the same judge in two separate trials, and were the subject of a single decision affirming the Board of Appeals' grant of special permits.[5] Plaintiffs then appealed to the Supreme Judicial Court.

Defendant Shapiro had been granted a special permit for the use of 6.843 acres of a 15.227 acre parcel owned by him for a tennis facility. Defendant Shine had contracted to purchase approximately forty acres of land, and had been granted a special permit to use eleven acres of that land for a tennis facility. All the land that was the subject of the permits was zoned A-2 under the zoning by-law of the town of Longmeadow.[6]

The A-2 classification represents the most restricted residential zone in the town. As a matter of right, it permits single family residences and certain civic uses: church, religious or denominational educational buildings, public school, library, museum, park, playground or recreational buildings, and municipal buildings and facilities. The Longmeadow Board of Appeals had discretionary authority to grant, subject to appropriate conditions, special permits for specified uses, including use for a "club not conducted for profit."[7]

The applications of the defendants specified that their respective tennis facilities would be operated as nonprofit clubs. After proper notice was given, a public hearing on the applications was held as required by law.[8] The special permits were granted subject to substantial sets of conditions and safeguards governing use of the tennis facilities.[9]

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[3] *Id.* at 2355-56, 355 N.E.2d at 463. The Meadows Racquet Club special permit was granted to Leo J. Shapiro, Shephard Cohen, and Leo Grillo. The Longmeadow Racquet Club, Inc. special permit was granted to Philip J. Shine.

[4] *See* G.L. c. 185B, § 22 (repealed by Acts of 1978, c. 478, § 91).

[5] 1976 Mass. Adv. Sh. at 2356, 355 N.E.2d at 463. The housing court entered judgment in the three cases separately.

[6] *Id.* at 2358, 355 N.E.2d at 464.

[7] Zoning By-Law, Town of Longmeadow, art. IV, § B, cl. 6.2. 1976 Mass. Adv. Sh. at 2359, 355 N.E.2d at 464.

[8] The proceedings in this case took place at all relevant times, prior to the appeal, before the effective date of the new Zoning Act. Thus, the older Act was applied. Former G.L. c. 40A, § 4 contained the requirements of a hearing, and former G.L. c. 40A, § 17 contained notice provisions. Under the new Zoning Act the parallel provisions are contained in G.L. c. 40A, § 9, for hearing, and § 15, for notice.

[9] 1976 Mass. Adv. Sh. at 2359-60 n.3, 355 N.E.2d at 465 n.3. Perhaps the most significant condition which was imposed was one making the special permit effective only for

Appealing from the decision in the housing court, the plaintiffs contended that the Board exceeded its authority in granting the special permits in several ways: (1) since there was nothing expressly covering the use similar to the character of a tennis facility within the zoning by-law, an exception could not be granted for a tennis facility, and thus the permits were invalid; (2) the so-called "clubs not conducted for profit" were indeed conducted for profit; (3) the permits constituted spot zoning; (4) the Board's failure to file with the town clerk its rules for conducting its business made its grant of the permits invalid; (5) certain of the Board's conditions and safeguards on the permits improperly delegated Board functions to the planning board; and (6) the chairman of the Board, a lawyer and a member of the firm that represented the estate of one of the sellers of the Shine parcel, improperly took part in the decisions.[10]

Regarding the character of the tennis facilities, the Court held that explicit reference in a zoning by-law to a use similar to the requested exception was not the proper test for the validity of the permits.[11] Rather, the Court deemed the relevant considerations to be whether the special permit would be in harmony with the general purpose and intent of the zoning by-law.[12] The Court emphasized that the Board's decisions had themselves taken note of the widespread citizen interest in tennis, the lack of indoor tennis facilities in the town, and how the public welfare and convenience would be served by the proposed facilities.[13] Additionally, the board had noted the presence of several golf, tennis, and swimming facilities in the Residence A-2 zone.[14] The Court found

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so long as the facilities were run by "clubs not conducted for profit." Each of the clubs was a corporation organized under G.L. c. 180.

[10] *Id.* at 2361-69, 355 N.E.2d at 465-69.

[11] *Id.* at 2361, 355 N.E.2d at 465. Former G.L. c. 40, § 4 stated:

> A zoning ordinance or by-law may provide that exceptions may be allowed to the regulations and restrictions contained therein, which shall be applicable to all of the districts of a particular class and of a character set forth in such ordinance or by-law. Such exceptions shall be in harmony with the general purpose and intent of the ordinance or by-law and may be subject to general or specific rules therein contained. The board of appeals estalished under section fourteen of such city or town, . . . may, in appropriate cases and subject to appropriate conditions and safeguards, grant to an applicant a special permit to make use of his land or to erect and maintain buildings or other structures thereon in accordance with such an exception.

The Board had the power under former G.L. c. 40A, § 15(2) "[t]o hear and decide applications for special permits for exceptions as provided in section four upon which such board is required to pass." Parallel provisions are contained in the new Zoning Act, G.L. c. 40A at § 9, pertaining to the criteria for special permits, and § 14(2), detailing the board of appeals' power to decide applications for special permits.

[12] 1976 Mass. Adv. Sh. at 2363, 355 N.E.2d at 466.

[13] *Id.* at 2362-63, 355 N.E.2d at 466.

[14] *Id.*

these facts adequate to support the Board's conclusion that the special permits would be in harmony with the general purposes of the by-law. The Court held that the similar findings of the trial court were adequate to support the conclusion that the use permitted by the special permits was within the scope of both the applicable statutes and the town's by-law.[15]

The Court reiterated the difference between the grant of a variance and of a special permit, and emphasized that the criteria for a special permit are less stringent than those for a variance.[16] The Court also commented that it would not review the wisdom of the Board's action, which the plaintiff had attacked, but only its validity.[17]

In holding that the clubs in question were indeed "clubs not conducted for profit" of the type contemplated by the zoning by-law,[18] the Court indicated that the plaintiffs had placed improper reliance on the case of *Carpenter v. Zoning Board of Appeals of Framingham.*[19] In *Carpenter* the trial judge had found that the purported club was "not a bona fide club and therefore . . . not an accepted use under the section of the zoning by-laws."[20] That case involved a supposed swimming club whose by-laws permitted anyone to come off the street and use the swimming pool. Here, on the contrary, the evidence indicated that the tennis clubs were of the type contemplated by the by-law.[21]

The Court found no merit in the contention that the grant of the special permits constituted spot-zoning.[22] The Court explained that the Longmeadow by-law itself contemplated that land classified as residential could be used for a "club not conducted for profit," with the Board of Appeals having discretion to grant the permit.[23] The action of the board did not reclassify the land or in any way amend the by-law with

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[15] *Id.*

[16] *Id.* at 2362, 355 N.E.2d at 466, *citing* Josephs v. Board of Appeals of Brookline, 362 Mass. 290, 291-95, 285 N.E.2d 436 (1972); Moore v. Cataldo, 356 Mass. 325, 327-28, 249 N.E.2d 578, 580-81 (1969); Wrona v. Board of Appeals of Pittsfield, 338 Mass. 87, 88-90, 153 N.E.2d 631, 633 (1958); Todd v. Board of Appeals of Yarmouth, 337 Mass. 162, 167-68, 148 N.E.2d 380, 384 (1958); Lawrence v. Board of Appeals of Lynn, 336 Mass. 87, 89-90, 142 N.E.2d 378, 381 (1957); Carson v. Board of Appeals of Lexington, 321 Mass. 649, 652-55, 75 N.E.2d 116, 117-19 (1947).

[17] *Id.* at 2362, 355 N.E.2d at 466.

[18] *Id.* at 2364-65, 355 N.E.2d at 467.

[19] 352 Mass. 54, 223 N.E.2d 679 (1967).

[20] *Id.* at 56, 223 N.E.2d at 681.

[21] *Id.*

[22] 1976 Mass. Adv. Sh. at 2365, 355 N.E.2d at 467. This specific issue had not been decided in Massachusetts but the Court noted, with extensive citations, that special permits have been held not to be spot zoning in other jurisdictions. *Id.* at 2365-66, 355 N.E.2d at 467-68. "As a special permit is not an amendment, it cannot constitute spot zoning." 3 ANDERSON, AMERICAN LAW OF ZONING, § 19.04 (1976).

[23] *Id.*

respect to the uses permitted; the Board had merely exercised the discretionary power which had been delegated to it.

The contention that the board had failed to file its rules with the town clerk as required by the Zoning Enabling Act was rejected on the ground that the rule was directory and not mandatory.[24] As to the plaintiffs' delegation argument, the Court indicated that it might have preferred that the Board of Appeals not have ordered that building plans, off-street parking, buffer areas and other similar details be approved by a majority of the planning board as well as a majority of the Board of Appeals.[25] However, this did not constitute an improper delegation of the Board's authority to the planning board under the standards set out in *Weld v. Board of Appeals of Gloucester*.[26] In *Weld* the Board had merely indicated its intent to grant a special permit at a future date upon the occurrence of a contingency. In the present case, the planning board approval was a proper "condition and safeguard" within the Board of Appeals' statutory authority. Thus, in *Kiss* "[t]he board did not abdicate its powers as it appears to have done in the *Weld* case."[27]

The Court further held that the action of the Board was not invalidated because its chairman, who had an interest in one of the parcels under consideration, advised the Board as to legal precedent after having withdrawn from deliberations regarding the application relating to that parcel.[28]

The Court affirmed the judgment of the Hampden Housing Court in both cases insofar as it had affirmed the Board's granting of the permits, but held that the lower court had erred in "dismissing" plaintiffs' actions.[29]

§15.4. Variance: Airport Extension: Effect of Official Approval. During the *Survey* year, the Supreme Judicial Court was faced with a case in which a landowner using property in a very specialized fashion, an airport, attempted to extend his runway use without seeking the appropriate approval, a zoning variance. In *Building Inspector of Lancaster v. Sanderson,*[1] the defendant-owner attempted, to justify his unauthorized extension of a runway, which use required a variance from Lancaster's zoning ordinance, upon the state's regulatory approval of his airport and the fact that the land had been purchased from the state with the approval of the Lancaster Board of Selectmen.

Prior to 1969, the defendant owned and operated an airport located

[24] *Id.* at 2367, 355 N.E.2d at 468.
[25] *Id.* at 2368, 355 N.E.2d at 468-69.
[26] 345 Mass. 376, 187 N.E.2d 854 (1963).
[27] 1976 Mass. Adv. Sh. at 2368, 355 N.E.2d at 468.
[28] *Id.* at 2369, 355 N.E.2d at 469.
[29] *Id.* at 2370, 355 N.E.2d at 469.

§15.4. [1] 1977 Mass. Adv. Sh. 479, 360 N.E.2d 1051.

entirely within the town of Shirley.[2] In 1969, he purchased from the Commonwealth a parcel of land in Lancaster which abutted the Shirley property.[3] The land had been previously classified residential or residential-recreational.[4] In 1970, the Lancaster Zoning Board of Appeals granted the defendant a variance authorizing the extension of his airport runway from the Shirley town line for a distance of 600 feet southerly on the Lancaster property acquired from the Commonwealth.[5] Sometime between 1970 and 1974 the defendant further extended the same runway southerly on the same parcel of land an additional distance of 1400 feet without obtaining any variance or other permit from the town.[6] In 1974, he did apply to the Board of Appeals for a variance covering the additional new runway, but the Board denied his request. From this denial he took no appeal.[7] The defendant did obtain annual certificates of approval for his airport from the Massachusetts Aeronautics Commission as required by law.[8] The certificate for 1974-1975 stated a runway length of 3,660 feet and the 1975-1976 certificate stated 2,460 feet. Certificates previously filed did not state any runway length.[9]

The Lancaster building inspector brought suit to enjoin use of the additional runway space in violation of the town's zoning by-law. The superior court entered judgment for the plaintiff, and the defendant appealed.

The Supreme Judicial Court found that the findings of fact by the trial court were not "clearly erroneous,"[10] and that the Town was not estopped from enforcing its zoning by-law because of an alleged representation by the chairman of the Lancaster Board of Selectmen to a member of the legislature that the Board had favored the purchase of land from the state for the runway extension.[11]

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[2] *Id.* at 480, 360 N.E.2d at 1052.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 480, 360 N.E.2d at 1052-53.

[6] *Id.* at 480-81, 360 N.E.2d at 1053.

[7] *Id.* at 480, 360 N.E.2d at 1053.

[8] G.L. c. 90, § 39B.

[9] 1977 Mass. Adv. Sh. at 480-81, 360 N.E.2d at 1052-53.

[10] Because the findings of fact were based largely on oral testimony, they were considered in light of Mass. R. Civ. P. 52(a), 365 Mass. 816 (1974), which states: "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." For discussion of the Massachusetts standard as compared to the federal one, *see* 1977 Mass. Adv. Sh. at 482-84, 360 N.E.2d at 1053-54.

[11] *Id.* at 488, 360 N.E.2d at 1056. The Court reached this conclusion by first noting that the record did not state that estoppel had been affirmatively pleaded by the defendant as required under Mass. R. Civ. P. 8(c), 365 Mass. 749 (1974). Inexplicably, the pleadings before the trial court were not a part of the record. Even if estoppel had been affirmatively pleaded, the Court has consistently held that a municipality cannot ordinarily be es-

At the root of the defendant's case was the claim that the land in question should have been exempt from the Lancaster zoning by-law for two reasons: the extended runway was a continuing nonconforming use,[12] and the operation of an airport is the discharge of a public function.[13]

Because the state owned the runway land before the passage of the Lancaster zoning by-law, the defendant claimed it was exempt from the zoning by-law, at least to the extent that the by-law might interfere with or prevent the use of the land by the Commonwealth in the accomplishment of its legitimate functions.[14] The Court assumed this premise to be correct. The defendant then claimed that at the time the Commonwealth still owned the land he made surveys and appraisals on it and applied to the State Aeronautics Commission for a certificate to use the land as a runway. He asserted that these acts "were part of the state's use"[15] and that his acts were those of an agent of the Massachusetts Aeronautics Commission before he became the owner of the land. The Court rejected this contention because it was unsupported by the facts,[16] and stated additionally that there was nothing in the record to warrant or permit a finding of agency status in the defendant.

The Court also found unpersuasive the argument that the use of the land was exempt from the by-law because airport use constitutes a public function, and that the towns of Shirley and Lancaster could have joined in the establishment of an airport commission.[17] Once again, the defendant relied on the contention that he was an agent of the Commonwealth. The Court found his status to be that of a private entrepreneur only.[18] The Court held that the holding of a license required by law as a condition to the operation of a business does not itself permit the licensee to operate the business in a place where it contravenes zoning by-laws or ordinances.[19]

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topped by the acts of its officers from enforcing its zoning by-law or ordinance. *See* 1977 Mass. Adv. Sh. at 484-88, 360 N.E.2d at 1054-55. In any event, the trial judge had made no findings on this subject; the defendant had not exhausted his opportunity under Mass. R. Civ. P. 52(b), 365 Mass. 817 (1974) to request that he do so; and the Court concluded that the facts as it understood them on appeal would not require a holding that the town was estopped from enforcing the zoning by-law against the defendant.

[12] *See* G.L. c. 40A, § 5. Under the new Zoning Act, *see* G.L. c. 40A, § 6.

[13] 1977 Mass. Adv. Sh. at 489-91, 360 N.E.2d at 1056-57.

[14] *See* Medford v. Marinucci Bros. & Co., 344 Mass. 50, 54-56, 181 N.E.2d 584, 587-88 (1962).

[15] 1977 Mass. Adv. Sh. at 489, 360 N.E.2d at 1056.

[16] *Id.* at 489, 360 N.E.2d at 1056. Again, the defendant failed to avail himself of the opportunity to request that the trial judge make additional findings of fact under Mass. R. Civ. P. 52(b), 365 Mass. 817 (1974).

[17] G.L. c. 90, § 51N.

[18] 1977 Mass. Adv. Sh. at 490, 360 N.E.2d at 1057.

[19] The Court cited Pratt v. Building Inspector of Gloucester, 330 Mass. 344, 345, 113

The result reached by the Court was a sound one, especially in light of facts tending to show that the defendant's arguments were no more than attempts to subsequently justify an unauthorized extension of his use.[20] Owners would be well advised by this decision that in a case where both land use and regulatory approval are necessary to operate in a desired fashion on land, the official approval of *all* applicable authorities must be sought and obtained before use.

§15.5. Land Use Legislation: Precedence over Local Zoning. During the *Survey* year, one case appeared which could reduce the power of regulation by local zoning laws over areas of ecological concern. In *Island Properties, Inc. v. Martha's Vineyard Comm.*,[1] the plaintiff proposed to develop 507 acres of land in the town of Oak Bluffs on Martha's Vineyard.[2] Definitive plans consistent with the town's by-laws were approved by the town planning board on June 7, 1974.[3] Twenty days later, however, the General Court enacted and the Governor signed Acts of 1974, c. 637 (chapter 637) entitled "An Act protecting land and water on Martha's Vineyard."[4] Enacted as an "emergency law,"[5] chapter 637 became effective immediately.[6] This legislation established the Martha's Vineyard Commission—a "public body corporate" —composed of twenty-one members[8] and charged with ensuring "that henceforth the land usages which will be permitted are those which will not be unduly detrimental to . . . the economy of the island, . . . [nor destructive of the] unique natural, historical, ecological, scientific, cultural and other values"[9] of Martha's Vineyard. To achieve these goals, the Commission is authorized to prescribe standards and criteria by which areas of the island can be designated as districts of

N.E.2d 816 (1953). The Court noted that the converse is equally true, *citing* Davidson v. Selectment of Duxbury, 358 Mass. 64, 66-68, 260 N.E.2d 695 (1970).

[20] Certainly the fact that Sanderson had previously obtained one variance for airport runway use tends to show that he was aware of the procedures necessary for proper approval.

§15.5. [1] 1977 Mass. Adv. Sh. 555, 361 N.E.2d 385.

[2] *Id.* at 556, 361 N.E.2d at 386.

[3] *Id.*

[4] *Id.* at 557, 361 N.E.2d at 386.

[5] Acts of 1974, c. 637 (introduction).

[6] G.L. c. 4, § 1.

[7] Acts of 1974, c. 637, § 2.

[8] The Commission is composed of one selectman or municipal agent from each of the six towns on Martha's Vineyard appointed by the board of selectmen of each town, nine residents of the island at large with no more than two residents nor less than one resident from each town, four non-residents appointed by the governor without voting privileges, one county commissioner of Duke's County, and one member of the governor's cabinet. *Id.*

[9] *Id.* at § 1.

"critical planning concern" (CPC) and by which development proposals can be characterized as "developments of regional impact" (DRI).[10] Once these criteria have been submitted to and approved by the Secretary of Communities and Development,[11] the Commission is empowered to designate nominated portions of the island as CPC districts and to issue guidelines for the future development of those districts.[12] The towns in which these areas are located are then allowed to adopt new zoning and development regulations which conform to the issued guidelines, subject to final approval by the Commission.[13] Should those towns fail to adopt conforming regulations the Commission is further authorized, after appropriate notice, to prescribe regulations for the town.[14] These new regulations, whether drafted by the town or by the Commission, are to be administered by the towns as part of their by-laws.[15]

Local town authorities, in turn, are required to use the Commission's criteria in reviewing development plans submitted to them for approval.[16] Those proposals which are characterized by town authorities as DRIs must be referred to the Commission for further review.[17] The Commission, after proper notice and public hearings, may either approve or disapprove the proposed DRI.[18] In doing so, the Commission is required to consider the potential impact of the proposed development on areas outside of the immediately affected municipality.[19] Finally, local authorities are prohibited from issuing development permits for proposals characterized as DRIs without Commission authorization.[20]

On March 4, 1976, the Commission designated the "Oak Bluffs Sengekontacket Pond District" as a CPC.[21] Plaintiff's property included eighty-seven percent of the land so designated.[22] As a result, plaintiff's

[10] *Id.* at § 8. Prior to the formulation of these criteria, local authorities are precluded from granting permits for large scale developments. *Id.* at § 7.

[11] On September 8, 1975, the Secretary approved standards proposed by the Commission. 1977 Mass. Adv. Sh. at 562, 361 N.E.2d at 388.

[12] Acts of 1974, c. 637, § 9. Prior to such designation, the Commission is required to give proper notice to all municipalities which include within their boundaries portions of the area to be designated a CPC district. The Commission must also give notice and conduct a public hearing pursuant to G.L. c. 30A, § 2. *Id.*

[13] *Id.* at § 11.

[14] *Id.*

[15] *Id.*

[16] *Id.* at § 14.

[17] *Id.*

[18] *Id.* at § 15.

[19] *Id.* at § 16.

[20] *Id.* at § 17.

[21] 1977 Mass. Adv. Sh. at 564, 361 N.E.2d at 389. The Commission was organized on December 5, 1974. Approval of the standards and criteria occurred on September 8, 1975, and the moratorium on issuance of permits terminated on October 23, 1975. *Id.* at 559, 361 N.E.2d at 387.

[22] *Id.* at 564, 361 N.E.2d at 390.

proposed development which had been approved by town authorities prior to passage of chapter 637 was in violation of the zoning regulations of Oak Bluffs as revised by the Commission.[23] Plaintiff sought a declaratory judgment that his land would not be affected by these new regulations, relying primarily on G.L. c. 40A, § 7A, which provides in relevant part:

> "provisions of the ordinance or by-law in effect at the time of the submission of the first submitted plan shall govern the land shown on [an] approved definitive plan, for a period of seven years from the date of endorsement of such approval notwithstanding any other provision of law . . . ."

The plaintiff argued that this language prohibited the application not only of subsequently formulated ordinances or by-laws, but also of *all* subsequently formulated *zoning laws.* To the extent, therefore, that chapter 637 could be properly termed a "zoning law," the plaintiff claimed exemption from its effect.[24] In support of this argument, the plaintiff cited language within chapter 637 itself. Paragraph 2 of section 7 states that "[n]othing in this act shall be construed to prohibit the planning board of a town on Martha's Vineyard from approving any definitive subdivision plan . . . provided that such . . . plan was duly submitted to said planning board prior to the effective date of this act."[25] The plaintiff contended that since his definitive plan had been properly approved by the local board prior to the effective date of chapter 637, this approval was valid by the saving provision of chapter 637, section 7.[26]

The Supreme Judicial Court refused to decide whether G.L. c. 40A, section 7A controlled or was superseded by chapter 637. The Court rejected the plaintiff's interpretation of the new law and construed the language of each provision so as to achieve maximum consistency.[27] The Court held that section 7A "is not directed to subsequent zoning laws in a general sense, but only to zoning ordinances or by-laws subsequently passed by municipalities *in the accustomed and ordinary way.*"[28] Regulations formulated by the Commission or in accordance with the Commission's guidelines are therefore unaffected by section

[23] Plaintiff originally proposed to divide the 507 acres into 850 building lots. 1977 Mass. Adv. Sh. at 556, 361 N.E.2d at 386. The revised regulations set a new density limit of one dwelling per 60,000 square feet of area, *Id.* at 564, 361 N.E.2d at 390, as well as other growth control measures. *Id.* at 565, 361 N.E.2d at 390.

[24] 1977 Mass. Adv. Sh. at 566-67, 361 N.E.2d at 391.

[25] Acts of 1974, c. 637, § 7, as amended by Acts of 1974, c. 759.

[26] 1977 Mass. Adv. Sh. at 571-72, 361 N.E.2d at 393.

[27] *Id.* at 567-71, 361 N.E.2d at 391-93.

[28] *Id.* at 568, 361 N.E.2d at 391 (emphasis added).

7A[29] since chapter 637 "is a polar opposite from those subsequent local enactments contemplated by § 7A."[30] Although the languge of chapter 637, section 7 provides for local approval of development plans submitted prior to July 27, 1974, the Court held that sections 10 and 15 of the Act impose additional barriers for areas designated as CPCs and for development plans characterized as DRIs.[31] While local approval would, therefore, continue to be the final step for most development proposals, those affecting CPCs or DRIs would be subject to additional Commission scrutiny and possible rejection.

In reaching this decision, the Court did not limit its consideration to the specific statutory language at issue, but was apparently influenced by what it saw as the ultimate goal of chapter 637. The Court stated, "It might be thought a perverse anomaly if [the] regional purposes [of chapter 637] could be thwarted, as to undeveloped resources requiring CPC or DRI status, by freezing and preserving for seven years preexisting local by-laws with narrow orientation."[32] The Court's action in this case thus appears to distinguish properly designated CPCs and DRIs from zoning districts and development proposals in general by suggesting that the former are governed by the provisions of chapter 637 alone. While the Court did not hold that chapter 637 actually supersedes prior zoning legislation, it did "not minimize [the] apparent force of this argument, considering the emergency nature and comprehensiveness of chapter 637 and the cogency of a legislative purpose to take into the statutory scheme all undeveloped land and water which plausibly required treatment as CPC districts or DRIs."[33] Therefore, other provisions of the general laws that conflict with chapter 637 are not guaranteed continued vitality where CPCs or DRIs are concerned simply by the clarity of their terms. While the Court has demonstrated a preference for salvatory construction, it has not ruled out the possibility of resolving statutory conflicts in favor of chapter 637 by means of protanto repeal.

§15.6. Extent of Section 7A Protection: Amended Zoning Ordinances. A developer who believes his subdivision plan lies outside the subdivision control law may submit the plan to the planning board for its endorsement. Failure of the board to act on the plan within fourteen days entitles the developer to obtain from the town clerk certification "that approval under the subdivision control law is not required."[1] The plan is thus deemed to have been endorsed by the plan-

[29] *Id.* at 571 n.23, 361 N.E.2d at 393 n.23.
[30] *Id.* at 569, 361 N.E.2d at 392.
[31] *Id.* at 572, 361 N.E.2d at 393.
[32] *Id.* at 569, 361 N.E.2d at 392.
[33] *Id.* at 571, 361 N.E.2d at 393.

[1] G.L. c. 41, § 81P.

ning board. Prior to its repeal, section 7A of the Zoning Enabling Act[2] protected the use of land shown on such a statutorily approved plan from certain changes in local zoning ordinances. Thus, the laws in effect at the time of approval govern use of the land for three years from the date of planning board endorsement.[3] The one exception to this moratorium permits an *increase* in the number of permitted uses.[4]

During the *Survey* year, the Supreme Judicial Court further clarified the extent to which section 7A restricts a municipality's authority to regulate use of land endorsed by operation of section 81P. In *Cape Ann Land Development Corp. v. City of Gloucester,*[5] a landowner had submitted a perimeter plan in December, 1972 for endorsement that subdivision approval was not required. The plan called for a shopping center in an area permitting such use. The planning board failed to act seasonably, thereby endorsing it.[6] The city amended its zoning ordinance in May, 1973 in a way that precluded the building of a shopping center on plaintiff's land. In June, 1973, detailed regulations governing shopping center use were adopted. Those regulations required a special permit from the city council before a shopping center, a "major project," could be constructed. In August, 1973, the city refused the developer's application for a building permit for the shopping center.[7] The board of appeals in turn rejected the developer's appeal from that denial.

Plaintiff then filed an appeal from the denial of the building permit to the superior court. He then later amended the appeal to include a petition for declaratory relief. The declaratory relief sought was a determination of the effect of the amended zoning restrictions on Cape Ann's right to build the planned shopping center.[8] The superior court consolidated the declaratory judgment proceeding and appeal, and from its judgment both parties appealed directly to the Supreme Judicial Court.[9]

The issue before the Court was the extent to which section 7A protected the project from the city's 1973 zoning changes because of the perimeter plan's earlier statutory approval.[10] The Court initially noted

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[2] Former G.L. c. 40A, § 7A. Almost identical language appears in the new Zoning Act. *See* G.L. c. 40A, § 6, sixth paragraph. For a discussion of the new Act, *see* Huber, *Zoning and Land Use,* 1976 ANN. SURV. MASS. LAW §§ 15.1-15.10.

[3] *Id.*

[4] *Id.*

[5] 1976 Mass. Adv. Sh. 2180, 353 N.E.2d 645.

[6] G.L. c. 41, § 81P. 1976 Mass. Adv. Sh. at 2181, 353 N.E.2d at 645-46.

[7] 1976 Mass. Adv. Sh. at 2181, 353 N.E.2d at 646. The landowner had not attempted to obtain a special permit, but sought a building permit instead. *Id.*

[8] *Id.* at 2182, 353 N.E.2d at 646.

[9] *Id.*

[10] *Id.*

its holding in *Bellows Farms, Inc. v. Building Inspector of Acton*[11] where it held that the three year protection of the section extended only to uses permitted under the zoning by-law and did not affect other provisions of the zoning by-law.[13] Thus *Bellows Farms* held that a zoning change which became effective during the three year period governing the *number* of apartment units which could be constructed could be applied to the plaintiff's parcel because it did not forbid the use for apartments.[14] The Court repeated its *Bellows Farms* statement that section 7A protection might encompass zoning changes which, though not directly affecting permissible uses, have the effect of nullifying the protection of section 7A.[14]

The developer conceded that the June, 1973 shopping center regulations applied to its parcel, but urged that such application was circumscribed in two respects. The first limitation urged upon the Court was that the regulations did not apply where they had the effect of practically prohibiting the shopping center use. The second limitation urged was that the newly applicable zoning provisions were invalid where they gave the city council discretion to deny a special permit.[15]

The Court noted that the superior court judge had retained jurisdiction over the declaratory judgment proceeding pending city council action on the special permit.[16] The Court approved of this course[17] and decided the case against this framework.[18]

The Court held that, for the duration of section 7A protection, the city council could deny a special permit for failure to comply with those new shopping center regulations which do not practically prohibit the protected use, or for failure to comply with such additional requirements as the state sanitary code or city building code.[19] The Court stated: "Section 7A protects that [shopping center] use, and the protection of

[11] 364 Mass. 253, 303 N.E.2d 728 (1973).

[12] *Id.* at 256, 303 N.E.2d at 730.

[13] *Id.* at 261-62, 303 N.E.2d at 732-33. In the *Bellows Farms* decision the Court engaged in an exhaustive inquiry into the legislative intent behind the amendment of section 7A by Acts of 1963, c. 578, which provided that the use of land approved by operation of G.L. c. 41, § 81P was to be granted a limited exemption from the effects of subsequent zoning amendments, as opposed to earlier language, inserted by Acts of 1960, c. 291, exempting any lot so approved. The Court concluded that the change indicated a legislative intent to grant a more limited survival of pre-amendment rights under amended zoning ordinances and by-laws. *Id.* at 258, 303 N.E.2d at 731. *See also* Perry v. Building Inspector of Nantucket, 1976 Mass. App. Ct. Adv. Sh. 845, 851-53, 350 N.E.2d 733, 736-37.

[14] 1976 Mass. Adv. Sh. at 2183, 353 N.E.2d at 646-47, *citing Bellows Farms*, 364 Mass. at 261, 303 N.E.2d at 733.

[15] *Id.* at 2183-85, 353 N.E.2d at 647.

[16] *Id.* at 2186, 353 N.E.2d at 647.

[17] *Id.* at 2187, 353 N.E.2d at 648.

[18] *Id.* at 2186, 353 N.E.2d at 648.

[19] *Id.*

§7A may not be eroded by the denial of a special permit for that use when the reason for that denial is the proposed protected use."[20] The Court went on to say that the city council could validly impose reasonable conditions on a special permit so long as they did not, either individually or collectively, practically prohibit the use.[21]

Cape Ann further develops the limitations of municipal action affecting uses protected by section 7A (now section 6, paragraph 6 of the new Zoning Act). The decision makes clear that section 7A may not be circumvented by subsequent zoning ordinances even if they do not directly clash with it. Thus a landowner whose plan has been approved, either directly or by operation of section 81P, is insured that section 7A protection will be effective. At the same time, valid community interests are protected. This is clear from the Court's allowance of reasonable conditions imposed by special permits and its clear statement that section 7A does not insulate a developing landowner from the requirements imposed by the state sanitary code or local building codes.

§15.7. Subdivision Plans: Constructive Approval by Planning Board. In *Zaltman v. Town Clerk of Stoneham,*[1] plaintiff had submitted a subdivision plan to the Stoneham Planning Board for approval. After a public hearing, the Board voted to disapprove the plans tentatively until certain changes suggested by the town engineer were made, whereupon the Board sent written notice of its action to the town clerk and to plaintiff.[2] Over the next four months plaintiff negotiated with the Board and the town engineer, which culminated in the drafting of a new plan acceptable to the Board.[3] Plaintiff subsequently determined, however, that the new plan was unacceptable to him because of its cost. Since more than six months had elapsed since the submission of the original plan, plaintiff requested the town clerk to certify the plan approved by operation of G.L. c. 41, § 81U.[4] This the clerk refused to do. Plaintiff then brought an action to compel the clerk to issue a certificate of approval of the plan.

The Appeals Court considered whether the Board had taken final action and, if so, whether such action had occurred within the sixty-day limit of section 81U. The court noted that the Board's action was ambig-

[20] *Id.*
[21] *Id.*

§15.7. [1] 1977 Mass. App. Ct. Adv. Sh. 436, 362 N.E.2d 215.
[2] *Id.* at 437-38, 362 N.E.2d at 216.
[3] *Id.* at 438, 362 N.E.2d at 216-17.
[4] Chapter 41, section 81U provides in pertinent part: "Failure of the planning board either to take final action or to file with the . . . town clerk a certificate of such action regarding a plan submitted by an applicant within sixty days after such submission . . . shall be deemed to be an approval thereof."

uous, and that the plaintiff, by seeking Board approval of amended plan, had conducted himself as if the Board's action was final, thereby raising the argument that the plaintiff was estopped from arguing that the action was not final.[5] The court did not reach the merits of this issue because the town had failed to comply with the requirements of section 81U.[6] That section requires the planning board to file with the town clerk a certificate of definitive action with regard to the approval request. The court held that the letter the Board sent to the clerk revealing its tentative disapproval was too conditional to serve as notice to anyone examining the records, which is the purpose of the filing requirement.[7] Therefore the court held that the planning board had constructively approved plaintiff's plan as originally submitted.[8]

The developer's victory may well have been a Phyrric one, in view of the court's reference to G.L. c. 41, § 81W. That section permits a planning board to "modify, amend or rescind" its approval of a plan.[9] To afford the board an opportunity to modify, amend or rescind its constructive approval, the court stayed its reversal for a sixty-day period. The plaintiff's complaint was to be dismissed if the board took action within this period, otherwise judgment would be entered for the plaintiff.[10]

§15.8. Action of Board of Appeals as a Decision: Time for Appeal. Massachusetts law requires any party—including municipal officers or boards—aggrieved by a decision of a board of appeals to file suit "within twenty days after the decision has been filed in the office of a city or town clerk."[1] Because the pivotal term "decision" has not been legislatively defined, the Appeals Court of Massachusetts was required during the 1977 *Survey* year to clarify when a decision is deemed made for statute of limitations purposes.

In *Planning Board of Falmouth v. Board of Appeals of Falmouth,*[2] the Planning Board appealed from a decision of the Board of Appeals which had conditionally granted a development permit authorizing the construction of a shopping center within an agricultural district. This appeal was filed twenty-one days after the Appeals Board had filed its

[5] 1977 Mass. App. Ct. Adv. Sh. at 439-41, 362 N.E.2d at 217-18.
[6] *Id.* at 441-42, 362 N.E.2d at 218.
[7] *Id., citing* Kay-Vee Realty Co., Inc. v. Town Clerk of Ludlow, 355 Mass. 165, 243 N.E.2d 813 (1969).
[8] *Id.* at 443, 362 N.E.2d at 218.
[9] *Id.*
[10] *Id.*

§15.8. [1] G.L. c. 40A, § 17.
[2] 1977 Mass. App. Ct. Adv. Sh. 559, 362 N.E.2d 1199.

opinion.[3] Since applicable law required such appeals to be filed within twenty days after the decision itself had been filed,[4] the trial court dismissed the appeal for lack of jurisdiction. The Planning Board challenged the dismissal with a two-point argument. First, the Board claimed that the appeals board had not in fact issued a decision granting a variance permit, but had merely issued an advisory opinion suggesting that a permit would be granted after particular conditions were met. In the plaintiff's view the action taken by the Appeals Board was not a decision as such, thereby making inapplicable the statute of limitations relating to board decisions.[5]

The plaintiff attempted to buttress the first point of his argument by referring to *Weld v. Board of Appeals of Gloucester*.[6] In that case, the Supreme Judicial Court held that the decision of a zoning board of appeals which had attempted to authorize the operation of a hotel in a single residence district subject to certain conditions did not operate as a permit since "the board must make a further determination of substance before the permit can issue."[7] As a result, the *Weld* Court interpreted the decision of the board of appeals as a mere advisory opinion, and invalidated it for that reason.[8] The Planning Board of Falmouth argued that since the board of appeals had made its decision conditional, the holding in *Weld* controlled. The Board thus characterized the board's action as an advisory opinion rather than a decision.[9]

The Appeals Court refused to be persuaded by this argument. In the court's view, *Weld* did not control because the Falmouth's board's decision did not "appear to contemplate further discretionary action of the board prior to the issuance of the permit."[10] Thus, the distinction drawn by the Appeals Court was not between conditional and non-conditional grants of variances, but "between a condition which contemplates a further determination of substance by the board of appeals and a condition which is simply vague."[11] Since no matters of substance were left for the Board of Appeals of Falmouth to consider, the decision of

[3] *Id.* at 559, 362 N.E.2d at 1200.

[4] At the time of this decision, appeals from decisions of boards of appeals were governed by G.L. c. 40A, § 21. 1977 Mass. App. Ct. Adv. Sh. at 559, 362 N.E.2d at 1200. Acts of 1975, c. 808, § 3 replaced this provision with G.L. c. 40A, § 17.

[5] 1977 Mass. App. Ct. Adv. Sh. at 560, 362 N.E.2d at 1200.

[6] 345 Mass. 376, 187 N.E.2d 854 (1963).

[7] *Id.* at 378, 187 N.E.2d at 856. The board of appeals of Gloucester had approved a request to operate the hotel subject to six conditions. One of these conditions was that "[t]he water situation must be arranged to the satisfaction of all concerned." *Id.* at 377, 187 N.E.2d at 855.

[8] *Id.* at 379, 187 N.E.2d at 856.

[9] 1977 Mass. App. Ct. Adv. Sh. at 560, 362 N.E.2d at 1200.

[10] *Id.* at 561, 362 N.E.2d at 1201.

[11] *Id.* at 562, 362 N.E.2d at 1201.

the Board amounted to a valid permit appealable at law.[12]

The Appeals Court, however, took one further step and held that "a decision by a board of appeals purporting to act on an application for a variance is presently appealable whether conditioned on further determinations of substance or not."[13] While substantive conditions may invalidate a decision that attempts to authorize a variance as in *Weld,* they do not "vitiate its character as a 'decision.'"[14] A decision is appealable, and subject to the requirements of any applicable statute of limitations, whenever "it purports to be a decision of the board . . . ."[15] While an advisory opinion may not, therefore, operate as a valid decision, it may fulfill the statute of limitations requirement of decision for purposes of appeal.

§15.9. Eminent Domain: Appellate Review and Admissible Valuation Evidence. In *Haufler v. Commonwealth,*[1] the Supreme Judicial Court held that appeals from rulings or judgments in a trial without a jury conducted under G.L. c. 79, § 22[2] would not be permitted when either party has seasonably claimed his right to a trial de novo before another judge sitting without a jury.

The case arose from the taking of land for the Dorchester campus of the University of Massachusetts at Boston in 1969.[3] The plaintiff, Haufler, challenged the value paid for his property in a jury waived trial. The Commonwealth unsuccessfully sought to introduce evidence concerning the price paid for supposedly similar land at a private sale two years before.[4] Because the findings of the court concerning valuation would be admissible in a subsequent trial de novo, the Commonwealth sought to appeal the superior court's ruling which excluded the valuation evidence before a trial de novo was held.[5]

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[12] *Id.* at 563, 362 N.E.2d at 1201.
[13] *Id.*
[14] *Id.*
[15] *Id.*

§15.9. [1] 1977 Mass. Adv. Sh. 957, 362 N.E.2d 916.
[2] G.L. c. 79, § 22 provides in relevant part:
Section 22 . . . The trial shall be by a judge of the superior court sitting without a jury. . . . The judge . . . shall file a written decision . . . with the clerk who shall forthwith notify the parties or counsel. . . . The decision or finding shall include a statement of any damages that are awarded and a report of the material facts found by him. Any party to the action aggrieved by the decision or finding shall have the right to a trial de novo before another judge sitting with a jury. . . . The request . . . shall be filed within ten days after the party making the request has received notice of such decision or finding. . . .
[3] 1977 Mass. Adv. Sh. at 957-58, 362 N.E.2d at 917.
[4] *Id.* at 958, 362 N.E.2d at 917.
[5] *Id.* at 959, 362 N.E.2d at 918. G.L. c. 79, § 22 provides in part:
The decision or finding, including any reward of damages, shall be prima facie

The Supreme Judicial Court held that since a trial de novo with a jury had been requested under section 22,[6] the decision of the trial judge sitting without a jury was not a final adjudication of the rights of the parties; it was thus not a "final judgment" from which an appeal could be taken.[7] Therefore, the only route for interlocutory appeal in a case such as this would be for the trial judge to report the matter to the Appeals Court.[8] Because this course was not followed, the Court decided that an appeal must await the outcome of the superior court trial.[9]

The Court noted that section 22 does not provide for an interlocutory challenge to the rulings of the trial judge, and it refused to "engraft such a procedure onto the statutory pattern."[10] The Court recognized that the decision of the first judge was admissible at the jury trial. If the decision was based on an error of law (such as the exclusion of admissible valuation evidence), its admission at the jury trial could constitute reversible error on appeal from the jury trial judgment.[11] The Court reasoned, however, that this risk of additional litigation did not outweigh the problems associated with the allowance of an interlocutory appeal.[12] The Court noted that the asserted error might not prejudice the seemingly aggrieved party during the jury trial and that, in any event, an interlocutory appeal would inject undesirable delay into eminent domain cases.[13] The Court decided the preferable course to be the presentation of all issues in a single appeal.[14]

While one can sympathize with the Commonwealth's desire to have an error-free trial de novo, the Supreme Judicial Court's decision was clearly correct. The trial without a jury provision is designed to expedite eminent domain proceedings since delay can create problems for the person whose property is taken. The trial de novo before a jury is still

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evidence upon such matters as are put in issue by the pleadings.

The Commonwealth argued that the rejection of its proffered evidence concerning the sale of the similar parcel had made the award of damages in the first trial improper and therefore precluded introduction of the damage award in the second trial. The second judge could not exclude the first judge's decision (including the valuation finding) although he might disagree with the first judge's conclusion of law. However, the second judge could exercise his discretion to admit or exclude evidence at the second trial regardless of what the first judge may have done with such evidence. *Id.* at 960 n.3, 362 N.E.2d at 918 n.3.

[6] Both parties requested trial de novo.

[7] 1977 Mass. Adv. Sh. at 959, 362 N.E.2d at 918.

[8] *Id.* at 960, 362 N.E.2d at 918. *See* G.L. c. 231, § 111; Mass. R. Civ. P. 64, 365 Mass. 831 (1974).

[9] 1977 Mass. Adv. Sh. at 960, 362 N.E.2d at 918.

[10] *Id.* at 959, 362 N.E.2d at 918.

[11] *Id.* at 960, 362 N.E.2d at 918.

[12] *Id.* at 960-61, 362 N.E.2d at 918.

[13] *Id.*

[14] *Id.* at 961, 362 N.E.2d at 918.

available to an aggrieved party and any errors in either trial can still be resolved by appeal after the trial de novo is held. Interlocutory appeals, if permitted, would add to the possibilities of delay and seriously impair the expeditiousness of proceedings before a judge without a jury.

Since the Court considered this a case of first impression, it decided to exercise its discretion and consider the merits of the Commonwealth's appeal rather than merely dismiss the appeal.[15] Relying on its prior decision in *Iris v. Hingham,*[16] the Court held that the trial judge was correct in excluding the evidence concerning the sale of the similar property.[17] Under *Iris,* evidence of the price paid for a similar parcel in a private sale is not admissible where the private purchaser has also provided other non-cash consideration that does not have a readily ascertainable value.[18] In the instant case, the purchaser of the allegedly similar parcel had agreed to construct an access road and railroad siding which would benefit seller's adjoining land. The seller had also retained an easement in the land sold.[19] As in *Iris,* the cash paid for the parcel was not the sole consideration and the other consideration did not have a readily ascertainable market value. Therefore, the sale which the Commonwealth sought to introduce into evidence was not comparable to the taking at issue, where the purchase price was the only consideration. Accordingly, the Court decided that the trial judge was correct in applying *Iris* and excluding the evidence of the amount paid for the similar parcel of land.[20]

§15.10. Eminent Domain: Calculation of Interest. In *R.H. White Realty Co., Inc. v. Boston Redevelopment Authority,*[1] the Supreme Judicial Court confronted two aspects of how interest on damages awarded upon a taking of land is to be calculated. The defendant Boston Redevelopment Authority (BRA) recorded its order of taking of the plaintiff's property on June 1, 1966.[2] The landowner, R.H. White, received mail notification of an award of $1,171,000 two days later on June 3, 1966.[3] The award was paid on August 31, 1966.[4] The BRA awarded an additional $445,000 to the landowner on March 4, 1969, which was paid on March 13, 1969.[5] In July 1967, the landowner filed a petition for assess-

[15] *Id.* at 957, 362 N.E.2d at 917.
[16] 303 Mass. 401, 22 N.E.2d 13 (1939).
[17] 1977 Mass. Adv. Sh. at 964, 362 N.E.2d at 920.
[18] 303 Mass. at 407-08, 22 N.E.2d at 17.
[19] 1977 Mass. Adv. Sh. at 963-64, 362 N.E.2d at 919-20.
[20] *Id.* at 964-65, 362 N.E.2d at 920.

§15.10. [1] 1976 Mass. Adv. Sh. 2740, 358 N.E.2d 440.
[2] *Id.* at 2740, 358 N.E.2d at 441.
[3] *Id.* at 2740-41, 358 N.E.2d at 441.
[4] *Id.*
[5] *Id.* at 2741, 358 N.E.2d at 441.

ment of damages, and a verdict of $2,850,000 for the plaintiff was returned on December 19, 1973.[6]

The BRA appealed this verdict and the Appeals Court affirmed.[7] Thereupon the Superior court clerk entered judgment for the plaintiff; this was nearly two years after the verdict was returned.[8]

The clerk calculated interest on the $2,850,000 award at the statutory rate of 6 percent.[9] Interest was allowed on the full amount of the verdict from June 1, 1966, the date of taking, to August 31, 1966, the date when the first payment was made. Interest was further allowed on the rest of the verdict from August 31, 1966 to March 13, 1969, the date of the second payment. After subtracting the second payment, the clerk computed interest on the balance until December 19, 1973, the date of the verdict, and added the balance, the principal and the interest accrued. The clerk then calculated interest for the twenty-three month period that the BRA's appeal stayed entry of judgment. The BRA then made a partial settlement on November 30, 1975 but withheld nearly $91,000 in interest that it disputed, representing interest from the date on which the landowner was notified of the award until the first two payments were made ($17,500) and interest on interest during the appeal period ($73,000).[10] The BRA moved in superior court for relief from the judgment, which was denied, and the Supreme Judicial Court granted the BRA direct appellate review.

The first contention of the BRA was that the interest should have stopped running on the date the awards became payable, and not on the dates that they were actually paid, because R.H. White never demanded payment.[11] The Court did not dispute this contention, but it focused on the question of when the award was "payable."[12] The Court found that the language of the 1966 and 1969 award letters did not establish that the awards were actually payable, but were "clear assertions that the awards were not yet 'payable.' "[13] The court held that interest is tolled

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[6] *Id.*

[7] 3 Mass. App. 505, 334 N.E.2d 637 (1975).

[8] 1976 Mass. Adv. Sh. at 2741, 358 N.E.2d at 441.

[9] G.L. c. 79, § 37.

[10] 1976 Mass. Adv. Sh. at 2741-43, 358 N.E.2d at 441-42; Brief for Appellee, *R.H. White Co.*, at 6-7.

[11] *Id.* at 2741-42, 358 N.E.2d at 441. G.L. c. 79, § 37 provides in part:

> [A]n award shall not bear interest after it is payable unless the body politic or corporate liable therefor fails upon demand to pay the same to the person entitled thereto.

[12] *Id.* at 2742, 358 N.E.2d at 441.

[13] *Id.* In the 1966 letter, the BRA stated: "Payment of damages to parties of interest will be made at this office within sixty (60) days. You will be further notified." In like tenor, the 1969 letter notifying plaintiff of the second award stated: "Payment of said additional damages will be made at this office at your convenience. We will call you when payment is ready." *Id.*

only when the landowner is notified of his immediate and unconditional entitlement to the award.[14]

The BRA's second contention was that the clerk's allowance of interest on interest was error.[15] In dealing with this contention, the Court made reference to other statutes providing for addition of interest to jury verdicts,[16] but found these statutes, like section 37 of chapter 79, to be silent on the exact method of calculation.[17] Since, under G.L. c. 79, section 22, judgment is to be entered and execution issued in eminent domain cases "as in actions at law," the Court decided that G.L. c. 235, section 8 would apply.[18] Under that statute, interest is to "be computed upon the amount of the . . . verdict . . . from the time when made to the time the judgment is entered."[19] The Court then observed that in 1973, when the verdict was returned, judgment did not enter then because the BRA obtained appellate review by a bill of exceptions. Under Mass. R. Civ. P. 1A, par. 7, which became effective July 1, 1974, the bill became an appeal.[20] The Court then held: "The judgment thus includes interest, and it is common ground that the judgment bears interest from the date of its rendition."[21]

The Court then noted that the superior court, in denying the BRA's motion for relief from judgment, had relied on *Nugent v. Boston Consolidated Gas Co.*[22] In that case the Supreme Judicial Court held that after a verdict is returned, interest is calculated from the date of the writ (or in the present case, the taking) to the verdict date, and added to the verdict. The total then "bears interest to the date of entering the judgment. . . ."[23] In approving the superior court's application of *Nugent* to eminent domain proceedings, the Court reasoned that a contrary

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[14] *Id., citing* Horne v. Boston Redevelopment Authority, 358 Mass. 460, 465, 266 N.E.2d 634, 638 (1970).

[15] G.L. c. 79, § 37 states in relevant part:

> A judgment, whether against the commonwealth or any other body politic or corporate, shall bear interest at the rate of six per cent per annum from the date of the entry of such judgment to and including the last day of the month prior to the month in which such judgment is satisfied, except that judgment against the commonwealth shall not bear interest if it is satisfied within thirty days of such entry. In case of trial by jury, the date of entry of judgment refers to judgment in the trial de novo.

For the method of computation utilized by the clerk, see text at note 10. *supra.*

[16] *See* G.L. c. 229, § 11 (wrongful death); G.L. c. 231, §§ 6B (damage to property and personal injuries) and 6C (contract).

[17] 1976 Mass. Adv. Sh. at 2743, 358 N.E.2d at 442.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 2743-44, 358 N.E.2d at 442.

[21] *Id.* at 2743, 358 N.E.2d at 442.

[22] 238 Mass. 221, 130 N.E. 488 (1921).

[23] *Id.* at 238, 130 N.E. at 494.

result would encourage meritless appeals and deprive plaintiff's of part of the benefit of the verdict.[24]

The Court's resolution of the issues was proper and soundly reasoned. The governmental body that is required to compensate for its taking should make prompt recompense for depriving the landowner of his property. Something more ought to be required of the government, if it wants to toll the accrual of interest from the date of taking, than merely to say, in effect, "The award is coming." And when the government appeals a jury award, thereby further delaying payment to the landowner, it is only fitting that the government be required to pay interest on the award so as to compensate the landowner for the lost use of the money.

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[24] 1976 Mass. Adv. Sh. at 2344, 358 N.E.2d at 442. The Court took notice of Boston Edison Co. v. Tritsch, 1976 Mass. Adv. Sh. 1220, 346 N.E.2d 901, wherein the Court directed interest on the verdict under G.L. c. 231, § 6B to be computed as simple interest from the date of the writ to the date of judgment. The Court stated that *Tritsch* should not be read as overruling *Nugent*. 1976 Mass. Adv. Sh. at 2743-44, 358 N.E.2d at 442-43.